

Marcia Glauberman

From: Terry Miller [millert@naperville.il.us]
Sent: Thursday, November 30, 2006 5:44 PM
To: Marcia Glauberman
Cc: Anne Levine
Subject: City Of Naperville Comment on MB Docket No. 06-189

Attachments: Final Filed Version of FCC Comment from Naperville.doc; Exhibit A.tif; Exhibit B.tif; Exhibit C2; Exhibit C1.small.JPG



Final Filed Version
of FCC Com...



Exhibit A.tif (160
KB)



Exhibit B.tif (2 MB)



Exhibit C2 (202 KB)



Exhibit
C1.small.JPG (36 KB)

Ms. Marcia Glauberman:

Attached please find the City of Naperville's Comment on MB Docket No. 06-189. It is our hope to have these comments included in the comment round. Should you require any additional information please feel free to contact us.

Terry Miller

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Naperville

December 1, 2006

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 2005

Re: City of Naperville Ex Parte Filing regarding, IP-Enabled Services, WC Docket No. 04-36, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch:

The purpose of this *ex parte* letter is to alert the Commission to the City of Naperville's disturbing experience with AT&T in its most recent efforts to negotiate an agreement to provide IPTV to the residents of the City of Naperville ("City"). The City is aware that the Commission is currently seeking public comment regarding cable franchising policy formation. We have previously forwarded correspondence to our Congressional representatives demonstrating our opposition to cable streamlining reforms. We would now, however, like to petition the Commission directly and relate to you specifically the nature of our unsettling experiences with AT&T.¹ In addition, the City expresses its opposition to the current FCC rulemaking activity related to IP-Enabled Services.

BACKGROUND

The City of Naperville was rated as the second best place to live in America for the year 2006 by *Money Magazine*. Indeed, the City has been named as one of the best places to live in the United States by *Money Magazine* for several years. This recognition is built on generations of collaboration with various business entities. This achievement recognizes the efforts of the entire City from developers to schools, to parks, to businesses and the many prior elected officials who remain committed to a set of values that include competition, equality, fair play and adherence to the law. As a City, we view ourselves as forward thinking leaders in

¹ See, City of Naperville Agenda items for July 18, 2006, August 15, 2006 [attached and incorporated as Exhibit A and B].

innovation and early adapters of new technology. In 1996, the City became one of the first communities in the Chicago area to offer a competing cable company to its citizens. Naperville residents currently enjoy the competition of two cable providers and two satellite providers. Interestingly, at one point AT&T owned each City incumbent cable provider.² Accordingly, when we heard of AT&T and its IPTV Project Lightspeed innovation the City was enthusiastic about adding AT&T as a fifth entrant into the competition for our citizens' video programming dollars. This market is conservatively estimated at between 30 and 40 million dollars, exclusive of the Internet, VoIP, and satellite services.

Indeed, so keen were our pro-competition instincts that we invited AT&T into the City for fact-finding meetings that swiftly graduated into contract negotiations. During the negotiations, the City pursued five fundamental goals: 1) Obtain municipal revenues consistent with cable franchise fees, including 5% fee on gross revenues, 1% PEG fee and 5% tax on VoIP; 2) Minimize liability and the potential for costly litigation; 3) Maintain control over the City's public right-of-way; 4) Maximize competition within the cable/competitive video services market in the City; and 5) Observe all Illinois Statutory level playing field requirements.³ All of the above considerations are included in our current franchise agreements. In addition, when AT&T asked the City to intercede and encourage cooperation and joint contract negotiations with specific neighbors (which AT&T designated), the City accepted the mantle of facilitator and potential early adopter. Deferring to the City, local municipal organizations may have inadvertently created precisely the type of quickly negotiated regionally acceptable model agreement that could address AT&T's need for "urgent" relief.⁴ Furthermore, these groups represented a potentially lucrative and unique opportunity for AT&T to engage a market of approximately 8-9 million Illinois consumers.⁵ In retrospect the fact that AT&T squandered this opportunity to reach so many consumers oddly defies AT&T's claims of urgency.

From the start of negotiations, City staff made it clear to AT&T that the City disagreed with the proposition that AT&T's IP video service was not cable service, that AT&T was not a cable operator and that AT&T was not subject to the same regulatory framework as cable television. City staff also noted that AT&T's contention that IPTV is not cable has also been rejected by AT&T's major IPTV competitor, Verizon. Indeed, as staff noted, Verizon has signed video franchises covering approximately 3 million households in nine (9) states.⁶ In light of

² AT&T at one point owned Ameritech New Media and sold the company to Wide Open West. In addition, AT&T at one point owned AT&T Broadband, and sold it to Comcast in 2002. Importantly, while AT&T owned Ameritech New Media and AT&T Broadband, the companies both maintained cable franchises with the City of Naperville.

³ The Illinois Level Playing Field statute, 65 ILCS 5/11-42-11, authorizes municipalities to "*license, franchise and tax the business of operating a community antenna television system.*"

⁴ See, AT&T's ex parte filing with the FCC dated May 24, 2006.

⁵ *Id.*

⁶ See, July 31, 2006, Verizon Press Release, found at the following web address:
<http://biz.yahoo.com/prnews/060731/nym206.html?v=45>

Verizon's success, AT&T's reluctance to sign franchise agreements appeared impractical and unpersuasive. Nevertheless, City staff agreed to enter into a contract with AT&T if, and only if, level playing field considerations could be observed. Indeed, City staff repeatedly informed AT&T that though the final agreement need not be called a "Cable Franchise Agreement," in sum and substance, the Agreement must place AT&T on a level playing field with cable providers. City staff also articulated that the number of IPTV related cabinets within the right-of-way, along with the aesthetic, environmental, public health and safety, and welfare concerns associated with these cabinets implicated considerable public policy considerations.⁷ Nevertheless, AT&T delayed and later refused to provide the City with a map demonstrating the location of AT&T cabinets and equipment proposed for the City's public right-of-way. A map, demonstrating the placement of large boxes in the public right-of-way, has been and will always be a vital consideration to any negotiation involving the approximately 160–200⁸ IPTV cabinets placed in the public right-of-way. Moreover, since there is absolutely no guarantee that any IPTV services will actually be available, much less offered *en mass*, examination of AT&T's demand on the right of way is essential. This consideration is particularly important since AT&T was still in testing stages of its IPTV product as of June 2006.⁹ The issue of IPTV cabinet placement also became particularly relevant after City staff became aware of an incident in which an AT&T cabinet exploded and caught fire in a suburban Houston, Texas neighborhood.

Throughout AT&T's attempts to implore federal and state lawmakers for regulatory favors, they have stated that their brand of deregulation will usher in a new era of robust competition. AT&T has also asserted that "urgent" legislative and/or regulatory relief from the conventional franchise negotiation process was necessary.¹⁰ AT&T premised the need for "urgent" FCC action on three distinct rationales. First, AT&T alleged that "delays in the franchising process" deter wireline video competition and broadband deployment. Second, AT&T alleged that its IPTV product is not subject to cable franchising. Third, AT&T alleged that build out is an immaterial and out-dated consideration. These arguments are baseless, and border on mere pretext for clearly preferential legislation or regulatory action. Indeed, having endured a five (5) month negotiation process with AT&T replete with delay, retreat,

⁷ See, attached photographs depicting 52B VRAD Cabinets manufactured by Alcatel for AT&T's for deployment in Project Lightspeed. [Exhibit C]

⁸ The number 160 – 200 is an extrapolation from AT&T's assertion that they will require one VRAD box for every 300 Naperville homes.

⁹ See , CNET News, June 5, 2006, *IPTV Prepares for Primetime*, by Marguerite Reardon, and *International Business Times*, July 5, 2006, *Internet TV: AT&T's Dubious Attempt, Experts say AT&T's new Internet-based TV Service Might miss the High-Def Wave*, by Thomas Fredrickson, quoting Todd Mitchell, a research analyst with Kaufman Bros as stating "The issue is that [the technology] doesn't work." See also, *Wisconsin Technology Network*, September 1, 2006, *Broadband blues; Don't fall for Lightspeed hype*, by James Carlini, published at <http://wistechology.com/article.php?id=3285>

¹⁰ See, AT&T ex parte FCC filing dated May 24, 2006.

contradiction, and obstinacy we are convinced that local franchising not only works, but it is essential, and should remain undisturbed by federal regulation or federal law.

AT&T's conduct in Illinois proves that AT&T may oppose local franchising precisely **because** it works. Local franchising is the primary vehicle by which a municipality can vet a potential corporate partner in terms of financial stability, technical proficiency, ethics, and commitment to service. In the post RCN¹¹ environment the public hearing provisions of level playing field law is vital to a municipality's ability to determine if a genuine need exists for an additional video service provider, and whether a given video service provider is responsible, accountable, and financially stable enough to provide comprehensive service to the community. In addition, local franchising grants to each municipality the right to balance the need for video service to be provided against other equally relevant needs including inconvenience, public right-of-way congestion, and equality considerations.

The local franchising process is vital because the process serves as a proxy by which a municipality can determine if a potential corporate partner can satisfy its financial, customer service, construction, and reporting obligations. Indeed, if a corporation cannot negotiate a franchise with credibility and dignity, it begs the question whether that same corporation could meet its reporting, service, repair, and privacy obligations without resort to lawsuit or intimidation. In the City's case, AT&T was weighed and measured and rejected with regard to many of AT&T's fundamental propositions. Specifically, the City rejected AT&T's claim that their IPTV product is exempt from cable law. The City rejected AT&T's claims that build-out is unnecessary. The City rejected AT&T's claim that is socially acceptable to serve some members of our community with a terrestrial based product and others with an inferior satellite product. Moreover, the City rejected AT&T claims that its investment in AT&T's IPTV technology or investment renders the product competitive. Furthermore, AT&T touts its claims to invest 4.6 billion dollars nationally over an approximate three (3) year period.¹² Yet AT&T fails to acknowledge that this 4.6 billion dollar investment may grossly undercapitalize AT&T's attempts to compete in a market place that generates 69 billion dollars annually,¹³ and invests approximately 11.1 billion annually in construction/upgrade expenditures.¹⁴ This level of investment pales not only to the investment of the cable industry, but also in comparison to

¹¹ After months of financial calamity the cable provider RCN filed for bankruptcy owing the city of Chicago \$169,000 related to its franchise agreements with Chicago, and the Chicago public access station \$127,806. The City of Chicago began fining RCN \$1 million a day, and it eventually owed more than \$150 million in fines.

¹² See, AT&T website, <http://www.sbc.com/gen/press-room?pid=6540>

¹³ See, Nation Cable Television Association statistics found at, <http://ncta.com/ContentView.aspx?hiddenavlink=true&type=PageSectionIndustryStati&contentId=54>

¹⁴ *Id.*

Verizon's construction commitment of 20 billion dollars.¹⁵ Indeed, Verizon has invested 1.5 billion dollars in the State of New Jersey alone.¹⁶ When combined with AT&T's hesitance to sign a contract for a term greater than five (5) years, this factor denoted to the City a significant potential for retreat, and a great likelihood that the City could be abandoned with dozens of large cabinets in our public right-of-way.

The Franchise Negotiation Process Does Not Cause Delay and Much of the Delay Currently Experienced by AT&T Can be Directly Attributable to AT&T Conduct.

City staff first met with AT&T regarding its Project Lightspeed technology on or about March 8, 2006. On or about March 29, 2006, staff contacted AT&T to arrange for a fact finding discussion to learn more about Project Lightspeed. In the five (5) months that followed those initial meetings, City staff read FCC filings and public pronouncements in which AT&T cited the franchise negotiation process as an impediment to fiber deployment. Interestingly, AT&T's position in its FCC filings presumed that municipalities do not want advanced communications services. Nothing could be further from the truth.

Indeed, the City invited AT&T into our community. The City negotiated in good faith for approximately five (5) months. During the meeting, the City agreed neither to grant nor to expressly deny AT&T Project Lightspeed permits during negotiations. AT&T agreed not to aggressively pursue forcing the City's hand on quick decisions on permits. In turn, the City neither initiated a moratorium, nor insisted upon a contract with AT&T deeming them a cable franchise pursuant to federal law or "CATV" provider under Illinois law. During initial discussions, the parties, in essence, wasted valuable time discussing AT&T's "first offer" a facially objectionable, "Memorandum of Understanding" that almost every Illinois municipality rejected.¹⁷ AT&T later explained that the first Memorandum of Understanding was merely a first offer, and not a serious offer. AT&T then proceeded to tender its second offer after squandering both time and credibility.

During the discussion regarding its second offer, AT&T representatives suggested a new method of resolving the impasse between AT&T and Illinois municipalities. AT&T representatives proposed an Agreement and Model Ordinance unilaterally drafted by AT&T lawyers that would edit the City's cable franchise regulations to allow for the franchising of both "cable companies" and "video service" providers.¹⁸ The parties spent the next several months

¹⁵ See, The Journal News, *Verizon invests in a fiber optic future*, August 27, 2006, by Julie Moran Alterio <http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20060827/BUSINESS01/608270312/1066/BUSINESS01>

¹⁶ See, *Verizon to invest \$1.5 billion to bring FiOS to NJ*, http://lw.pennnet.com/Articles/Article_Display.cfm?Section=ONART&PUBLICATION_ID=13&ARTICLE_ID=261779&C=NNWS

¹⁷ See, Attached Memorandum of Understanding, drafted by AT&T [Exhibit B].

¹⁸ See, Attached Ordinance drafted by AT&T for the City [Exhibit B].

negotiating and editing the terms of the second offer. During this time it took AT&T approximately three (3) weeks to respond to the City's first counter proposal. AT&T then took an additional three (3) weeks to respond to the City's second proposal. During the delay, City staff began to develop grave concerns about the veracity of AT&T's claim that they legitimately wanted to form a mutually agreeable contract.

While AT&T delayed, the broadband market advanced dramatically. Specifically, while AT&T delayed, FTTH (fiber-to-the-house deployment) reached 463,000 homes during the second quarter of 2006.¹⁹ This growth represented a thirty-four (34) percent increase over the previous quarter. Moreover, this growth represented a sixty-six (66) percent increase over the last quarter of 2005. Importantly, this growth demonstrates that Verizon's FiOS project is currently dominating the market with 81 percent of total deployments.²⁰ Unlike AT&T, Verizon has aggressively pursued and signed franchise agreements. These facts appear to clearly stand for the proposition that franchising works not only from a municipal standpoint, but from a corporate standpoint as well. If local franchising does not work for AT&T, it may be a direct result of AT&T's unwillingness to actually sign local franchise agreements.

AT&T's Argument that its Illinois Deployment of its IPTV Product Does Not Trigger Cable Franchising or Illinois Equivalent CATV Requirements is Unpersuasive

AT&T claims its own deployment of video services using new Internet-based technologies does not trigger local cable franchising requirements because AT&T will not be a "cable operator" offering "cable service" over "cable systems" within the meaning of the Communications Act. This claim is baseless. Indeed, these statements have prompted Congressman Joe Barton, a proponent of franchise reform to state: "Our friends at AT&T have sent this silly letter [to Congressman Dingell] saying they're not a cable service, which they shouldn't have done. . . We explicitly say they're a cable service."²¹ It seems odd that AT&T would seek to disregard this pronouncement by such a recognized legislative authority.

In addition, these claims are utterly unpersuasive in Illinois. The Illinois Level Playing Field statute, 65 ILCS 5/11-42-11, authorizes municipalities to "*license, franchise and tax the*

¹⁹ See, Ovum-RHK U.S. fiber-to-the-home (FTTH) subscribers numbers (PON and active Ethernet) for the second quarter of 2006. See, also http://lw.pennnet.com/Articles/Article_Display.cfm?Section=ARTCL&Category=XMARK&PUBLICATION_ID=13&ARTICLE_ID=262050

²⁰ While AT&T representatives have made assertions that its IPTV product is not a fiber to the premises product this argument is unpersuasive when viewed in the light of its deployment in so called "green fields", or areas of new construction. In these green fields AT&T deploys a fiber to the premises product quite similar to Verizon's Fios product. In these instances, AT&T has little factual or legal basis to assert that its product should be exempt from cable law and Verizon's should not.

²¹ See, National Journal's Telecommunications Update, by Drew Clark <http://www.njtelecomupdate.com/lenya/telco/live/tb-BKZH1144269035135.html>

business of operating a community antenna television system." Thus, even if Project Lightspeed's video programming do not constitute "cable services" under the Federal Cable Act, it is entirely possible that said video programming services constitute a "community antenna television system" under the Illinois Level Playing Field statute. Moreover, under Illinois law the definition of community antenna television system is extraordinarily broad, and certainly encompasses IPTV. Given this broad definition, it is highly unpersuasive for AT&T to claim Illinois municipalities have no legal authority to compel franchising.

Finally, AT&T's claim that they are not cable stands in stark contrast to their competitor Verizon, a company offering an identical IPTV product to the IPTV product AT&T offers in newly constructed subdivision. Indeed, Verizon has signed video franchises covering approximately 3 million households in nine (9) states, and it currently offers FiOS TV (Verizon's IPTV product) in parts of California, Florida, Massachusetts, New York, Texas and Virginia and Maryland. Moreover, Bell South represents another example of a telecommunications company experiencing great success with the current franchising process. As stated in the DOJ *ex parte* filing Bell South obtained twenty franchises in the 1990s, representing 1.4 million. Accordingly, the inability to enter viable franchise agreements on a mass scale appears to be a phenomenon unique to AT&T, and patently insufficient as a justification for drastic franchising reform.

AT&T's Objections to Build-out Contravene Illinois Law and Sound Public Policy

The City is obligated to follow Illinois Level Playing Field requirements. 65 ILCS 5/11-42-11. Pursuant to this law, the City should not and could not sign an agreement under terms or conditions more favorable or less burdensome than the incumbent cable provider agreements. Specifically, this law examines the territorial extent of the franchise, system design, construction schedules, service to subscribers and indemnification. Given this requirement, should an Illinois court agree with Representative Barton that AT&T's IPTV product is a cable product, then it would be illegal for the City to completely disregard build-out considerations. Nevertheless, during negotiations, AT&T proposed a technology neutral provision. This provision, however, improperly vested AT&T with near limitless discretion regarding where, when, and how they will construct their IPTV product. Indeed, AT&T's provision left AT&T with the discretion not to build the IPTV product at all, but instead serve the City with satellite service only. This solution is highly problematic, because build-out requirements cannot, and should not be satisfied with the exclusive use of satellite products. Satellite products provide neither PEG channels, customer service requirements, or cable fee revenues. As mentioned earlier, the City strongly supports bringing in more cable competition for its residents. We desire competition for ALL of our residents. We do not want out-of-state corporations to determine which neighborhoods are important enough to receive a state-of-the-art product, and which neighborhoods are fodder for inferior alternative products.

In addition to these considerations AT&T's position regarding build-out presumes that AT&T has no duty to tender to the City an "as built" map demonstrating the potential placement of IPTV cabinets. Indeed, during negotiations, while AT&T asserted that they would build the IPTV product out to serve ninety-three (93) percent of the City, AT&T also insisted that they

would not codify this ninety-three (93) percent build out in the language of a contract. Moreover, AT&T utterly refused to provide the City with a map of its planned construction. Without an acceptable as-built map or build-out language in the contract, the City had no legal basis to enforce AT&T's "commitment," to build out ninety-three (93) of the City with its IPTV product. Finally, AT&T's refusal to tender an as-built map may additionally contravene established Illinois law. Specifically, the Illinois Administrative Code provides the following compels utilities exchange data and information, relative to proposed and existing construction, and changes in operating conditions which may affect or be likely to affect situations of proximity. Ill. Admin. Code. Tit. 83 § 305.80.

CONCLUSION

The local cable franchising process functions well in the City and it ensures that our community's specific needs are met and that local customers are protected. We applaud efforts to increase competition in the video programming marketplace. However, the local cable franchising process should not be used as an excuse for the failure of new cable service providers to enter into the marketplace.

Respectfully submitted,
City Of Naperville, Illinois

By: Peter T. Burchard
400 South Eagle
Naperville, Illinois 60540
November 29, 2006



Naperville

CITY COUNCIL
7-18-06
AGENDA ITEM K7

COUNCIL AGENDA ITEM SUMMARY SHEET

TITLE: Memorandum of Understanding Between the City of Naperville and AT&T
Regarding Project Lightspeed

CITY COUNCIL AGENDA DATE: July 18, 2006

SYNOPSIS: Memorandum providing the status of negotiations regarding Project Lightspeed, and a request for direction regarding the build-out issue, pursuant to the options provided by staff.

COUNCIL ACTION PREVIOUSLY TAKEN:

Date of Action	Item No.	Action

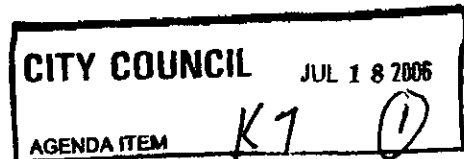
TYPE OF VOTE REQUIRED: Simply majority

COUNCIL ACTION REQUESTED: Direct staff to prepare the agreement based upon Council's direction, and schedule a public hearing on the agreement for the August 15, 2006 City Council meeting.

Submitted by:	Prepared by:
Name <u>Margo L. Ely</u>	Name <u>Terry Miller</u>
Dept. <u>Legal Department</u>	Dept. <u>Legal Department</u>

AGENDA ITEM NOTES

CITY OF NAPERVILLE



DATE: July 12, 2006

TO: Peter Burchard, City Manager

THROUGH: Margo Ely, City Attorney

FROM: Terry Miller, Senior Assistant City Attorney

SUBJECT: Memorandum of Understanding between the City of Naperville and AT&T regarding Project Lightspeed

ACTION REQUESTED: Direct staff to schedule a public hearing and present a Competitive Video Services Agreement with AT&T, to present for City Council approval at the August 15, 2006 City Council Meeting.

BACKGROUND: Project Lightspeed is AT&T's new video Internet Protocol (IP) based entertainment package that includes a video-on-demand library, satellite TV programming and other video offerings. The service will feature hundreds of channels, a web browser interface and wireless phone service from a single provider. The project offers Naperville residents greater programming choices, price competition, and technological innovations. The project's success requires permits from the City in order to locate cabinets in the City's right-of-way. The cabinets are roughly the size of a traffic control box.

AT&T contends that the product is an information service as defined by the Federal Communications Commission because it is delivered over an IP platform. As such, AT&T contends it is exempt from the requirement of a mandatory franchise agreement. Despite this position, however, staff has pursued an agreement with AT&T for two months in order to enhance competition and choice for Naperville residents. Under the tentative agreement with AT&T, Naperville will expand competition within the Cable and Competitive Video Services market. AT&T has cooperated in the negotiations. The agreement also promises to increase revenues to the City, and expand financial support for PEG. Staff is ready for City Council direction.

NAPERVILLE'S GOALS DURING THE NEGOTIATIONS WITH AT&T

During the negotiations with AT&T, the City has pursued the following goals:

1. Obtain municipal revenues consistent with cable franchise fees, including 5% fee on gross revenues, 1% PEG fee and 5% tax on Voice over Internet Protocol (VoIP).
2. Minimize liability and the potential for costly litigation.
3. Maximize control over Naperville Public Right of Way.

4. Maximize competition within the Cable/Competitive Video Services Market in Naperville.
5. Observe all Illinois Statutory Level Playing Field requirements

CURRENT STATUS OF NEGOTIATIONS: The parties have reached agreement on the following terms and conditions, which are reflected in the attached draft Competitive Video Services Agreement:

POINTS OF AGREEMENT:

1. **REVENUE.** AT&T has agreed to pay Naperville 5% of all gross revenues from subscriptions, advertising revenue, and home shopping, 1% for PEG. AT&T agrees to pay to Naperville three \$310,000 payments in lieu of providing additional NCTV facilities. AT&T agrees to provide capacity to stream NCTV programming on a website in addition to providing the content to subscribers. The website can be accessed through the city's website.
2. **UPFRONT PREPAYMENT.** AT&T has agreed to pay to Naperville \$2,700,000, as a one time pre-payment of Competitive Video Service fees. The \$2,700,000 will be set off from future revenues with 1/3 of the prepayment deducted from revenues due and owing Naperville from subscription fees during the first year of Lightspeed operations. Another 1/3 of the prepayment will be deducted from revenues due and owing Naperville from subscription fees during the second year of Lightspeed operations. The final 1/3 of the prepayment will be deducted from revenues due and owing Naperville from subscription fees during the third year of Lightspeed operations. The return of the prepayment is designed to act as an incentive for AT&T to "build out" throughout Naperville.
3. **DEFENSE AND INDEMNIFICATION.** AT&T has agreed that to the extent that Comcast or WOW sues Naperville for entering the contract with AT&T, then AT&T will defend the lawsuit at their expense and with lawyers of our mutual choosing. Should AT&T lose any lawsuit with Comcast or WOW then to the degree that Naperville loses any Cable revenues due and owing from either Comcast or WOW, then Naperville can deduct that loss from the \$2,700,000 prepayment.
4. **PERMITS.** AT&T has agreed to abide by all permitting and construction requirements Naperville applies to its Public Right of Way. The City of Naperville agrees to grant AT&T the use of the Public Right of Way for its IPTV product.
5. **TERM.** AT&T agrees that the term of the contract should be for eight initial years, followed by a term of seven years at the parties' mutual agreement. This equals the 15 year equivalent Naperville incumbent cable providers

6. **CODE AMENDMENT.** The City agrees to amend Title 9, Chapter 1, Article D of the Naperville Municipal Code to provide for franchising Competitive Video Service Providers, and to allow incumbent cable providers to "opt in" to an identical Competitive Video Service Agreement.
7. **UNIVERSAL COVERAGE.** AT&T agrees to provide video service on a non-discriminatory basis, and without regard to the income or minority status of any resident or group of residents residing within the municipal boundaries of the CITY. The parties have agreed that this universal coverage is an essential term of this agreement. Similar to cable companies, AT&T does not intend to provide Project Lightspeed to every resident, due to technical challenges. However, in order to achieve universal coverage, AT&T will provide other equivalent alternative video programming technology, namely satellite television. The parties agree to this condition.

POINT OF DISAGREEMENT:

1. **BUILDOUT:** While AT&T has agreed to provide universal coverage to Naperville, there remains the issue of how and when that coverage will be achieved. A conventional cable contract will contain build out requirements that provide for universal coverage within 18 – 36 months of the effective date. In addition, the conventional cable contract may allow waivers in the event that any portion of a City does not meet density requirements. In other words, cable providers can apply for waivers where a particular area does not contain enough homes to make the provision of cable service economically feasible. Although AT&T has not agreed to a build out provision, it has represented its intention to cover approximately 93% of Naperville with its IPTV product within 3 years. AT&T has also committed to serving the remainder of Naperville with alternative satellite products and services. This compares favorably with the approximately 85% build out for Naperville by incumbent cable providers. The outstanding issue in discussions with AT&T is the company's reluctance to include the build out provision in the Agreement.

The commitment to equally and timely serve all of the residences of Naperville is a serious issue. Accordingly, the question of build out is a major point of contention between the parties. Moreover, incumbent cable providers have expressed concerns about build out, pointing out that Illinois Level Playing Field law compels Naperville to maintain a level playing field amongst cable providers. Illinois law, however, does not demand an identical playing field between cable providers. Therefore, a contractual resolution of the build out question may be achieved that respects level playing field obligations, and AT&T's concerns about committing to a rigid build out schedule.

AT&T is reluctant to include a build out provision because a build out map will convey proprietary information to competitors. AT&T also expressed concern that the placement of a build out map in the contract will provide precedent to

commit AT&T to build 93% build out in future municipal contracts. This is unacceptable to AT&T since it has different build out plans for different communities. However, without a precise build out map or build out language in the contract, Naperville has no legal basis to enforce the build out commitment, or demonstrate that the contract adheres to level playing field obligations.

The City Council has three options in directing staff with respect to the build out issue:

Option 1: Concur with staff and direct that the Agreement include a build out requirement.

Option 2: Concur with AT&T and direct that the Agreement not include a build out requirement.

Option 3: Direct that the Agreement include a build out provision that requires the parties to negotiate language within 60 days.

Staff recommends Option 1.

RECOMMENDATION: It is recommended that the City Council direct staff to schedule a public hearing and present the Agreement in accordance with Option 1, with a build out provision included.



Naperville

CITY COUNCIL

8-15-06

AGENDA ITEM *M2abc*

COUNCIL AGENDA ITEM SUMMARY SHEET

TITLE: Public Hearing for Adoption of a Resolution Approving a Competitive Video Services Agreement between the City of Naperville and AT&T

CITY COUNCIL AGENDA DATE: August 15, 2006

SYNOPSIS: AT&T is requesting approval of a competitive video services agreement without a build-out option. Staff is providing two options for consideration. Option A provides for an agreement with a build-out option, and Option B provides for an agreement without a build-out option. Staff recommends approval of Option A.

COUNCIL ACTION PREVIOUSLY TAKEN:

Date of Action	Item No.	Action
7/18/06	K7	Directed staff to prepare the agreement, and schedule a public hearing for August 15, 2006.

TYPE OF VOTE REQUIRED: Simply majority for passage of the resolution

COUNCIL ACTION REQUESTED:

- A. Conduct the Public Hearing.
- B. Adopt a Resolution approving either the Option A agreement or the Option B agreement.
- C. Direct Staff to prepare an Ordinance amending the Naperville Municipal Code consistent with the provisions of Option A or Option B.

Submitted by:

Name

Margo L. Ely *ME*

Dept.

Legal Department

Prepared by:

Name

Terry Miller *T Miller*

Dept.

Legal Department

AGENDA ITEM NOTES

CITY OF NAPERVILLE
MEMORANDUM

AGENDA ITEM

M2abc (1)

DATE: August 9, 2006

TO: Peter Burchard, City Manager

THROUGH: Margo Ely, City Attorney *me*

FROM: Terry Miller, Senior Assistant City Attorney *(m)*

SUBJECT: Memorandum of Understanding between the City of Naperville and AT&T regarding Project Lightspeed

ACTION REQUESTED:

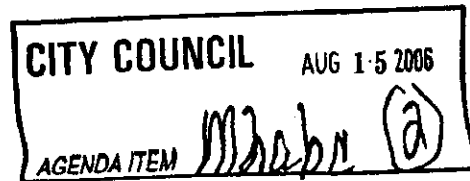
1. Conduct the public hearing; and
2. Adopt the resolution authorizing execution of either Option A or Option B.

Option A: Staff's Recommendation: The Resolution authorizes the execution of a Competitive Video Services Agreement with AT&T that includes a build out provision in full compliance with Illinois Level Playing Field obligations, and compliance with reporting, zoning and screening regulations for the placement of cabinets in the right-of-way.

Option B: AT&T Recommendation: The Resolution authorizes the execution of a Competitive Video Services Agreement with AT&T that has no requirement for build out and contains weak indemnification language, but includes similar zoning and screening regulations for the placement of cabinets in the right-of-way.

3. Direct staff to draft an ordinance amending the Naperville Municipal Code that is consistent with either Option A or Option B.

BACKGROUND: On July 18, 2006, the City Council directed staff to schedule a public hearing to consider a Competitive Services Agreement with AT&T for the August 15, 2006 City Council meeting. In addition, the City Council directed staff to continue negotiating the agreement with AT&T to minimize the City's risks in light of AT&T's refusal to commit to a buildout schedule or a buildout requirement. Since that time, staff has attempted to negotiate an acceptable agreement with AT&T, without success. Both agreements include a requirement that AT&T will remit to the City 5% of the IPTV gross revenues to the City as a franchise fee as well as 1% for PEG. In addition both agreements include provisions for emergency notification and customer service standards.



PROJECT LIGHTSPEED

AT&T wishes to offer a new Internet Protocol (IP) based entertainment package that includes a video-on-demand library, satellite TV programming to consumers in the City of Naperville. AT&T has requested permits to locate cabinets in the City's right-of-way. There will be approximately one cabinet for every 300 Naperville homes. The cabinets are roughly the size of a traffic control box approximately 60 inches high and 40 inches wide. Staff has requested that AT&T bring a cabinet to the Council meeting for inspection. The number of these cabinets, along with the aesthetic, environmental, and public, health safety and welfare concerns associated with these cabinets implicate public policy considerations. AT&T has refused to provide the City an "as built" map demonstrating the location of each cabinet proposed for the Naperville right-of-way.

AT&T contends that the product is an information service as defined by the Federal Communications Commission because it is delivered over an IP platform. As such, AT&T contends it is exempt from the requirement of a mandatory franchise agreement. This position has been embraced by only a few other known cities. (Grove City, Ohio, North Chicago, Illinois, and San Ramon, California are the most notable). Moreover, given Illinois Level Playing Field Law, most Illinois communities have rejected AT&T's position that AT&T is exempt from mandatory franchise agreements. Naperville staff has noted that AT&T's contention that IPTV is not cable has also been rejected by AT&T's major IPTV competitor Verizon. Indeed, Verizon has aggressively pursued and signed dozens of franchise agreements. Specifically, Verizon has signed video franchises covering approximately 3 million households in nine states, and it currently offers FiOS TV (Verizon's IPTV product) in parts of California, Florida, Massachusetts, New York, Texas and Virginia and Maryland.

DISCUSSION

NAPERVILLE'S GOALS DURING THE NEGOTIATIONS WITH AT&T

During the negotiations with AT&T, the City has pursued the following goals:

1. Obtain municipal revenues consistent with cable franchise fees, including 5% fee on gross revenues, 1% PEG fee and 5% tax on Voice over Internet Protocol (VoIP).
2. Minimize liability and the potential for costly litigation.
3. Maximize control over Naperville Public Right of Way.
4. Maximize competition within the Cable/Competitive Video Services Market in Naperville.
5. Observe all Illinois Statutory Level Playing Field requirements

CURRENT STATUS OF NEGOTIATIONS: Naperville has negotiated in good faith with AT&T since March 2006, and the parties have reached agreement on many vital contractual provisions. However, there remains a considerable gap between the parties relative to other provisions. Accordingly, staff has forwarded to Council for consideration two separate and distinct agreements.

AT&T's PROPOSED COMPETITIVE VIDEO SERVICES AGREEMENT

AT&T provided its last contract proposal on August 7, 2006, which is attached as Exhibit A. This contract offers the City the follow features, benefits, and risks:

Technology Neutral Build out. AT&T has agreed to provide universal coverage to the City. This coverage will be provided in a technology neutral manner, which means AT&T would provide either IPTV or satellite television across the City. According to this technology neutral provision, AT&T could serve all or none of Naperville with its IPTV product. The language would allow AT&T to serve all of Naperville with a satellite product. Even though AT&T has represented that it intends to serve 93% of Naperville with its IPTV product, they have refused to obligate themselves contractually to the 93% coverage explaining that such a provision would provide precedent for municipalities where AT&T does not intend to provide such broad coverage. Absent an express build out provision, the agreement would be vulnerable to attack by incumbent cable companies for violation of the level playing field. In addition, the City would have no ability to enforce such a 93% requirement. This presents the Council with an issue of fundamental fairness. Is it fair that one resident receives a state of the art product while another resident does not? Additionally, from an economic perspective the technology neutral provision entails a separate and distinct problem. To the degree that AT&T acquires an existing cable consumer and provides that consumer with satellite service, those revenues would be lost to the City since satellite television is exempt from payment of the 5% cable franchise fees.

1. **Joint Defense and Indemnification.** AT&T has agreed to indemnify, defend and hold harmless the City, its officers, agents and employees. In the event that any incumbent cable service provider(s) or consumer of the service in the City files a claim against the City in state or federal court challenging the AT&T Agreement, AT&T has agreed to pay the full amount of any final judgment or award issued by a court against the City. AT&T has also agreed to pay any settlement negotiated by AT&T with respect to the claim and all other expenses related to the resolution of the claim.

AT&T will not pay the Plaintiff's costs, interest and attorneys' fees if ordered by the court. In addition, AT&T will choose the counsel that will represent the City in the litigation, subject to the City's reasonable consent. However, AT&T will maintain control of the litigation, not the City. Moreover, AT&T refuses to make the City whole for a Cable Company's withholding of franchise revenues. Finally, the exclusion of costs, interest and attorneys' fees leaves the City in the position of paying these fees in the event AT&T loses the litigation controlled by AT&T.

2. **Prepayment Funds.** AT&T has proposed to pay to Naperville a sum of \$2.7 Million Dollars as a prepayment for their franchise revenues. AT&T has represented that this is a considerable investment of financial resources to the City of Naperville. AT&T will receive a credit equal to 100% of the prepayment granted to Naperville. The prepayment constitutes a fraction of the funds the City could lose in the event of legal action from the city's incumbent cable providers, who pay approximately 1.6 - 1.8 million dollars in cable franchise fees annually to the City. In addition, under AT&T's recent contract proposal,

AT&T could terminate the Agreement, and be entitled to a full refund, and any amount not promptly refunded within 45 days would be subject to 6% annual interest.

STAFF PROPOSED COMPETITIVE VIDEO SERVICE AGREEMENT:

1. **Build Out.** AT&T has proposed a technology neutral means of "building out" universal coverage. The question of build out is a major point of contention between the parties. Staff has proposed several solutions to the build out requirement. However, AT&T is steadfast in its refusal to include any language directly or indirectly related to build out. In light of AT&T's position, staff recommends that this issue should be resolved in favor of requiring a build out provision. Moreover, to the degree that AT&T's product is deemed cable, the City is obligated to follow Illinois Level Playing Field requirements. 65 ILCS 5/11-42-11. Pursuant to this law, the City should not sign any Agreement under terms or conditions more favorable or less burdensome than the WOW and Comcast Agreements. Specifically, this law examines the territorial extent of the franchise, system design, construction schedules, service to subscribers and indemnification. Given this requirement, it would be difficult for the City to completely disregard build out considerations.

AT&T's proposed technology neutral provision, however, improperly vests AT&T with near limitless discretion regarding where, when, and how they will construct their IPTV product. Without an acceptable build out map or build out language in the contract, Naperville has no legal basis to enforce the 93% build out AT&T "commitment," or demonstrate that the contract adheres to level playing field obligations.

2. **Defense And Indemnification.** One of staff's primary objectives during the negotiations with AT&T has been to minimize liability and the potential for costly litigation. In addition, staff has requested that AT&T make the City whole if incumbent cable companies withhold revenues. However, AT&T will not agree to this request. The AT&T proposed contract exposes the City to potential for both consumer based litigation, and level playing field litigation. Because of the potential for litigation, the contract should also include a comprehensive indemnification and defense provision. The indemnification and defense provision of AT&T's Agreement, however, is far less comprehensive than the comparable provisions in the incumbent cable Agreements. The indemnification provision of a standard cable franchise is much broader than AT&T is willing to accept.

RECOMMENDATION: It is recommended that the City Council approve Option A and approve the Resolution authorizing the Execution of a Competitive Video Service Agreement with AT&T that includes a build out provision in full compliance with Illinois Level Playing Field obligations. Further, staff recommends that Council direct staff to draft an ordinance to amend the Naperville Municipal Code to reflect the conditions contained in the agreement.

CITY COUNCIL AUG 15 2006
AGENDA ITEM *M2abc* (5)

OPTION A: STAFF'S RECOMMENDATION

RESOLUTION NO. 06 - ____

**A RESOLUTION APPROVING A COMPETITIVE
VIDEO SERVICE AGREEMENT BETWEEN
THE CITY OF NAPERVILLE AND AT&T**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NAPERVILLE,
DUPAGE AND WILL COUNTIES, ILLINOIS,** in exercise of its home rule authority as
follows:

SECTION 1: The Competitive Video Service Agreement between the City of
Naperville and AT&T, attached to this resolution as Exhibit A, is hereby approved.

SECTION 2: The City Manager and City Clerk are directed to execute the agreement on
behalf of the City.

SECTION 3: This Resolution shall be in full force and effect upon its passage and
approval.

ADOPTED this _____ day of _____, 2006.

AYES:

NAYS:

ABSENT:

APPROVED this _____ day of _____, 2006.

A. George Pradel
Mayor

ATTEST:

Suzanne L. Gagner, CMC
City Clerk

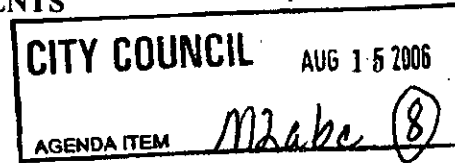
CITY COUNCIL	AUG 15 2006
AGENDA ITEM	<i>M2abc (7)</i>

COMPETITIVE VIDEO SERVICE AGREEMENT

BETWEEN

THE CITY OF NAPERVILLE AND AT&T

**COMPETITIVE VIDEO SERVICE AGREEMENT
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THIS COMPETITIVE VIDEO SERVICE AGREEMENT (this "Agreement") dated _____, 2006 ("Effective Date") is made by and between Illinois Bell Telephone Company, an Illinois corporation doing business as AT&T Illinois ("AT&T") and the City of Naperville, a municipal corporation of the State of Illinois (the "CITY"). AT&T and the CITY shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

WHEREAS, AT&T intends to provide video service on a non-discriminatory basis, and without regard to the income or minority status of any resident or group of residents residing in the AT&T Service Area located within the municipal boundaries of the CITY, as shown in Appendix A (the "Service Area"). The Service Area shall consist of the entire CITY OF NAPERVILLE, and AT&T intends to make video programming available, to residential units within the general CITY boundaries, by use of terrestrial based products only; and

WHEREAS, AT&T recognizes the right of the CITY to impose reasonable conditions on the use of the CITY ROW related to the construction, operation and maintenance of the IP Network; and

WHEREAS, under the Municipal Code of the CITY, a Competitive Video Service Provider must enter into a Franchise Agreement with the CITY before it can occupy or use the public ROW for the purpose of providing Competitive Video Service, as defined by the Municipal Code, to the citizens of the CITY; and

WHEREAS, AT&T is a Competitive Video Service Provider, as defined by the Municipal Code of the CITY, and it enters into this Franchise Agreement with the CITY to comply with the Municipal Code of the CITY; and

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms and conditions contained herein, the CITY and AT&T agree as follows.

1. **TITLE 9, CHAPTER 1, ARTICLE D GRANT AND REQUIREMENTS.**

1.1 Pursuant to the Municipal Code of the CITY, the CITY hereby authorizes AT&T to occupy, or use public ROW as provided herein, and to provide Competitive Video Service within the CITY, so long as the terms of this Agreement are met, and all applicable Code provisions are met, including but not limited to all applicable ROW, zoning, taxation, and construction rules and regulations. Title 9, Chapter __, Article ____, is incorporated herein by reference as though fully set forth.

1.2 AT&T agrees that it must locate its equipment in the ROW so as to cause only minimum interference with the proper use of streets, alleys and other public ways and places, and to cause only minimum impact upon, and interference with the rights and reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways. No fixtures

shall be placed in any public ways in such a manner to interfere with the usual travel on such public ways.

1.3 AT&T agrees that no fixtures or equipment shall be placed in any public ways as to interfere with usual travel on, or maintenance of such public ways. Nor shall such fixtures or equipment limit the visibility of vehicular and/or pedestrian traffic.

1.4 AT&T agrees to comply with the CITY's request to place AT&T equipment on public property where possible, and promptly comply with reasonable CITY directions with respect to the location and screening of AT&T's equipment and facilities in the CITY on a case-by-case basis.

1.5 AT&T agrees to construct its System within the ROW, in accordance with the specifications of AT&T's as built map, attached and incorporated herein as Exhibit _____, and as may be amended from time to time by mutual agreement of AT&T and the City Engineer.

2. RESERVATION OF RIGHTS.

2.1 The right is hereby reserved by the CITY to adopt and enforce, in addition to the terms, conditions and provisions contained in this Agreement and in otherwise existing applicable ordinances, such ordinances, rules and regulations as it shall find necessary or desirable in the exercise of its police powers; provided, that such ordinances, rules and regulations shall be reasonable and shall not be in material or substantial conflict with the rights herein granted. Subject to federal and state law, and home rule authority, the CITY specifically reserves the right to levy such taxes on the privilege of providing telecommunications services, or transmitting messages, which may specifically include Competitive Video Service, or a tax on consumers of Competitive Video Service as are lawful and equally applicable to all other providers of Competitive Video Service or the providers of comparable services in the CITY.

2.2 In addition to the specific rights of inspection otherwise provided for in this Agreement, the CITY shall also have the right to make such inspections at reasonable times and places as it shall find necessary to insure compliance with the terms provisions and conditions of this Agreement and other relevant provisions of law.

3. AMENDMENT OF THIS AGREEMENT.

3.1 It is the intent of the Parties that this Agreement may be amended from time to time in accordance with this Section to allow AT&T to implement new services and developments, or to propose an amendment to any terms allowed by law, and each Party agrees to bargain in good faith with the other Party upon the initiation of any such proposed amendments.

3.2 If either Party determines that a change is recommended and consistent with the terms of this Agreement, and is economically feasible as determined following a joint evaluation of AT&T's financial condition, the length of the term remaining, economic waste, if any, that would occur should the terms be changed, and the profitability of the services provided in the CITY, the Parties will in good faith, review and negotiate the terms of the change and any amendment to this Agreement. Based on this review, and upon adoption of such a change or new requirement through a mutually acceptable amendment, the change will become effective.